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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BANK OF COUSHATTA, et al.,

Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE AMICI CURIAE AMERICAN BANKERS ASSOCIATION AND LOUISIANA BANKERS ASSOCIATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a bank and bankers are entitled to notice, an opportunity to be heard and judicial review before a capital directive issued by the Federal Deposit Insurance Corporation may be enforced by the courts.

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INTEREST OF THE AMICI CURIAE

The American Bankers Association and Louisiana Bankers Association hereby respectfully submit this brief as amici curiae in support of the Petitioners with the consent of the parties. The signed consents of each are filed together with this brief.

The American Bankers Association is the principal national trade association of the commercial banking industry in the United States, having as members both national and state-chartered banks located in each of the fifty states and the District of Columbia. Member banks of the Association range from the

smallest of community banks through regional, super-regional and money center banks. Collectively, the membership holds approximately ninety-five percent of domestic assets of all American commercial banks.

The Louisiana Bankers Association is the principal state trade association of the commercial banking industry in Louisiana, representing most of the approximately 230 banks located there. Virtually all of the members of both associations are insured by the Respondent Federal Deposit Insurance Corporation.

This is a case of first impression in this Court involving application and interpretation of an eight year old statute, the International Lending Supervision Act, codified in relevant part at 12 U.S.C. section 3907. Under this statute, the FDIC is authorized to establish whatever minimum level of capital[1] it deems

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[1] "Capital" includes common stock, preferred stock, surplus, undivided profits, reserves, convertible debt, subordinated notes and debentures and several more esoteric items. *See* 12 C.F.R. § 325.2(h), (i) and (l) (1991). The minimum capital adequacy rule in effect at the time of issuance of the capital directive here was that banks must maintain a ratio of total capital to total assets of 6 percent or more (12 C.F.R. § 325.3(b) (1991)), but the FDIC may make exceptions to this requirement (*Id.* at § 325.3(d)). However, effective April 10, 1991, FDIC adopted changes to the capital adequacy rules that establish a two-part capital test. 56 Fed. Reg. 10160 (March 11, 1991). First, the total capital to total assets ratio (the leverage ratio) was lowered to four percent and a new capital measure, the risk-based capital ratio was set at eight percent. For most small community banks, this results in a lower amount of capital being required by the FDIC. Bank of Coushatta thus has an outstanding capital directive against it, issued because its capital level was "unsafe and unsound" by then-applicable standards. The directive remains in force even though there are new standards in effect and, to our knowledge, there has been no determination made

necessary or appropriate for banking institutions to maintain; it is authorized to determine that failure to maintain required capital is an "unsafe and unsound practice"; and it is authorized to issue a "directive" to a bank requiring it to submit and adhere to a plan designed to achieve the required capital. Such capital directives may be enforced in court.

Besides failure to maintain required capital, there exist a whole panoply of activities, the number of which is limited only by one's imagination, that could be thought or charged or found to be "unsafe and unsound practices" in the banking industry. For all other such cases, however, there is a carefully prescribed legislative scheme for determining the validity of the allegations by the relevant bank regulatory agency, set forth in 12 U.S.C. section 1818. This scheme requires a notice of charges, a hearing before a presumptively neutral administrative law judge, a decision, and the right to seek and receive review of that decision in a United States Court of Appeals. But in the case of alleged capital insufficiency, the FDIC claims to be exempt from such procedural safeguards, and the Fifth Circuit agrees.

Since federal bank regulatory agencies, like banks or, indeed, any organizations, are staffed by fallible human beings, it is inevitable that they can sometimes be wrong in what they do.[2] When regulators do err,

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whether the Bank's capital level—then or now—is "unsafe and unsound." But FDIC seeks to place such a capricious result beyond the scope of judicial review.

[2] As an example, a bank's capital level may be seriously affected by the actions of the government agency itself. Bank examiners may insist that certain loans be written off or written

persons aggrieved by their actions must have some meaningful forum for redress. This fundamental principle of freedom from arbitrary government action lies at the heart of the constitutional system of checks and balances, the First Amendment right to petition for redress of grievances, and the Fifth and Fourteenth Amendments. The Fifth Circuit decision for which review is sought here denies that opportunity, to the detriment of many more institutions and people than only the Petitioners here. If an unchecked government agency can run roughshod over the Bank of Coushatta here in the interests of expediency, then it can do likewise to any bank. We do not deny the right, duty, or even the desirability of FDIC supervision of the banking industry in the interests of preserving and protecting the insurance fund, the public, and the banks themselves. But that responsibility is not incompatible with the grant to affected banks and bankers of the opportunity to defend themselves. As

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down, or that loan loss reserves be increased. But the determination of when and to what extent a particular transaction becomes a "loss" is more often than not a subjective judgment about which reasonable minds may differ. In one recent case, examiners classified a $102 million loan as a complete loss, even though the lender has been collecting $900,000 per month in interest on the loan, the payments are current and the loan has been valued at more than fifty cents on the dollar in the secondary market. (Zuckerman & Atkinson, *Wells Chief Went to Washington To Appeal Harsh Loan Evaluation*, American Banker, July 18, 1991 at 1). If such a determination, alone or coupled with similar determinations, caused the capital of the bank to drop below the magic six percent, the bank could—by virtue of government action alone—be facing a capital directive, and under the Fifth Circuit decision would have no recourse, no opportunity, ever, to contest the arguably wrong loan classification.

representatives of the banking industry, your amici respectfully submit that it is in the interest of our respective members to preserve that opportunity.

SUMMARY OF THE ARGUMENT

This Court's decision in *Mathews v. Eldridge*, 424 U.S. 319 (1976) sets forth a three-part test for determining when due process requires that a party be afforded an evidentiary hearing before the party may finally be deprived of some property or liberty interest. The Fifth Circuit decision for which review is here sought pays only lip service to this Court's directive. It found that one of the factors weighed in favor of a hearing for the Bank and its directors, but nevertheless ruled against such a hearing based upon the other two factors. The court perfunctorily assumed, contrary to the only evidence on point, that there was an overriding governmental interest in expediency (to which due process is anathema). But the most critical—and wrong—determination the court below made was to find that in *this* case there was a minimal risk of deprivation of the rights of the Bank and its directors and, *therefore*, capital directives will *always* be immune from judicial review. That rule is not what *Mathews v. Eldridge* requires, and it ought not be applied to the Petitioners.

REASONS FOR GRANTING THE WRIT

In this case, the Fifth Circuit has decided the due process claims raised by the Bank and its directors in a way that conflicts with the three-part test laid down by this Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976). In addition, the current litigation represents the first attempt to apply the *Mathews* test

specifically to the authority of federal regulatory agencies to issue capital directives. The case therefore raises an important question of federal law—one bound to recur frequently in the absence of review here—which has not been, but should be, settled by this Court.

The *Mathews v. Eldridge* Test

As indicated above, this Court has decreed that there are three factors which must be taken into account and weighed by the courts in order to determine when due process requires that some form of hearing be held before an individual may finally be deprived of a property interest. *Mathews v. Eldridge*, 424 U.S. at 333-335.

The first of these is the private interest that will be affected by the official action. In this case, the Fifth Circuit found that "the private interest affected is obviously substantial". *FDIC v. Bank of Coushatta*, 930 F.2d 1122, 1131 (5th Cir. 1991) (Pet. App. 18a). The Respondent apparently concedes that this is so. *Brief For the Respondent in Opposition* at 7. Nevertheless, since the *Mathews* test is a balancing one, it is important to emphasize here just how important that interest is rather than risk having it understated and omitted from serious consideration. The court below has held that the issuance of capital directives by the bank regulatory agencies is a matter within the unreviewable discretion of the agencies—meaning that the agency may or may not entertain a bank's protests against the issuance of such a directive as the agency itself sees fit. Moreover, upon application by the agency, a District Court is expected to "enforce" such a directive summarily and, indeed in this

case, *ex parte*. Since capital directives are unreviewable, there are no real grounds for an appeal to a U.S. Circuit Court of Appeals of such an *ex parte* order. But once that order has been duly issued by a court having subject matter and personal jurisdiction (not in issue here), it must be obeyed regardless of its validity. Disobedience of even an invalid order is punishable as criminal contempt. Court orders must be obeyed unless or until reversed or set aside in an orderly fashion. *Maness v. Meyers*, 419 U.S. 449, 459 (1975); *Walker v. City of Birmingham*, 388 U.S. 307,320-321 (1967); *U.S. v. United Mine Workers*, 330 U.S. 258, 293 (1947). Thus, in the event that the bank or the bankers in this case are eventually charged with contempt, the *only* question will be whether or not they complied with the court's order. Never having had the opportunity to challenge the validity of the capital directive in the first place, they will be denied the opportunity to challenge it at that point as well.

The third *Mathews* factor to be weighed is the government's interest. Here, in one short paragraph, the court below concludes that "the government's interest in having capital directives *promptly* implemented is significant". *FDIC v. Bank of Coushatta*, 930 F.2d at 1131 (Pet. App. 18a) (emphasis added). There having been no evidentiary hearings in this case, and no findings of fact, that conclusion is obviously based upon nothing except the arguments of the FDIC's lawyers—arguments which are belied by FDIC's actual dalliance in this case. FDIC issued the capital directive in this case on September 22, 1989, addressing the bank's condition as of April 28, 1989. (Pet. App. 31a-33a). *Nine months later*, on May 25,

1990, the FDIC's regional counsel wrote a letter to the District Court seeking judicial enforcement, without notice to the bank. Almost two months after that, the District Court entered its *ex parte* order (Pet. App. 21a). The Respondent seemed entirely content to allow fifteen months to elapse before it got around to addressing the bank's April 1989 condition. Such a real delay is wildly inconsistent with the allegations relied upon by the Fifth Circuit to the effect that even a few moments taken to supply notice to the bank of intended judicial action, even a short hearing, would delay the directive and allow a bank's financially troubled status to deteriorate further.[3]

It is, however, the second *Mathews* factor that is most critical here: "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." 424 U.S. at 335. Here, the Fifth Circuit mixes the constitutional and Administrative Procedure Act issues raised by the bank, perhaps necessarily so. It concludes that the Constitution does not require a hearing because FDIC pro-

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[3] There is another curiosity in this respect as well. In the Fifth Circuit, in order to satisfy the third *Mathews* factor, FDIC prevailed upon the court to conclude that the capital directive is an important tool for use by the banking regulatory agencies in addressing troubled banks—so important that its use should not be impeded by the procedural safeguards elsewhere applicable. But the Respondent has changed its tune now that this case is in a different forum. In the absence of a conflict among the Circuits, this Court generally limits its grants of certiorari to those cases raising "an *important* question of federal law." S.Ct. Rule 10(c) (emphasis added). The Respondent now belittles the importance of capital directives, claiming that they "are relatively rarely used." (*Brief in Opp.* at 13, n. 8)

cedures "satisfy Fifth Amendment due process." 930 F.2d at 1132 (Pet. App. 19a). But that is entirely an abstract holding, based solely upon the mere existence of "procedures" on paper. One can never know if these procedures satisfy due process when, in the same breath, the court holds (a) that FDIC's actions are committed to agency discretion by law (*Id.* at n. 8) and (b) not subject to judicial review because a court would have no meaningful standard against which to judge the agency's exercise of discretion". 930 F.2d at 1128 (Pet. App. 11a, quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)). In point of fact, there are "standards" against which to judge the agency's actions. While they are "standards" set by the agency itself, they are standards nonetheless. Indeed, the Fifth Circuit talks at length about what is "required" of the FDIC by its own rules. *See, e.g.*, 930 F.2d at 1130-1131 (Pet. App. 16a-17a)). FDIC is "required", for example, to "consider" the bank's response to a Notice of Intent to Issue a Capital Directive. That is a "standard" against which the agency's subsequent action could be measured. The word "consider" is a readily understood, simple English word with which courts are familiar. It means to reflect upon, think about with a degree of care, to regard or treat in an attentive, solicitous or kindly way. *Ratner v. Stark County Board of Revision*, 35 Ohio St. 3d 36, 517 N.E.2d 915, 917 (1988). It does not mean the same thing as simply to read. *Bowing v. Board of Trustees of Green River Community College*, 85 Wash. 2d 300, 534 P.2d 1365, 1372 (1975). But in this case we do not and cannot know whether and to what extent FDIC "considered" the bank's response, because the courts below have held that its "consideration, if any, is not subject to judicial re-

view. The Fifth Circuit goes on to say that an FDIC decision comes only after an *extensive* examination by a *trained* bank examiner. 930 F.2d at 1131 (Pet. App. at 17a). We do not and cannot know how extensive was the examination here or how well trained was the bank examiner in question, since those matters are not subject to judicial review. And yet, if those are indeed "requirements" which satisfy due process, they are likewise the kind of "standards" by which agency action may be judged.

It is no answer to say, as the court below does in this case, that "[t]he Bank does not contend that the FDIC did not follow its procedures". *Id.* Without any opportunity for any sort of a hearing, administrative or judicial, the bank is in no position even to ask whether procedures were followed or not, and if it cannot know or learn the answer to that question, it obviously would have no basis for a contention that procedures were not followed.

It is likewise no answer to claim that the FDIC reached the right result in this case (*See, e.g. Brief in Opp.* at 16). Of necessity, the amici must leave it to the Petitioners to discuss the merits of their own case. We hasten to point out, however, that to the extent the Fifth Circuit holds that the issuance of capital directives is not subject to judicial review under the Administrative Procedure Act, it is a precedent which must apply across the board—even when the FDIC gets it wrong. That makes this case one of far more importance than FDIC represents it to be—one warranting review by this Court. If the FDIC is so confident of its rectitude in this case or its capacity to reach correct results in all cases, then it should not be ashamed or afraid to defend its actions

before a neutral magistrate. Yet it has expended great efforts here to avoid precisely that result.

The decision of the Fifth Circuit creates a strange and intolerable impasse. "Due process" is satisfied in this case because and only because "procedures" exist, and therefore there is no constitutional problem with what FDIC has done here. At the same time, no one is entitled to raise any questions about those procedures because they involve matters committed to agency discretion and not subject to judicial review. Those two conclusions cannot logically co-exist.

CONCLUSION

For all of the reasons set forth herein, the American Bankers Association and Louisiana Bankers Association hereby respectfully urge the Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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